

8 June 2016

Hon Christopher Finlayson QC, Attorney-General

Consistency with the New Zealand Bill of Rights Act 1990: Telecommunications (Property Access and Other Matters) Amendment Bill

Purpose

1. We have considered whether the Telecommunications (Property Access and Other Matters) Amendment Bill ('the Bill') is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have not yet received a final version of the Bill. This advice has been prepared with the latest version of the Bill (PCO 19561/2.3). We will provide you with further advice if the final version of the Bill includes amendments that affect the conclusions in this advice.
3. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression). Our analysis is set out below.

The Bill

4. The Bill amends the Telecommunications Act 2001 ('the Act'). The Bill's objectives are as follows:
 - a. to reduce compliance costs for Telecommunications Development Levy ('TDL') payers by addressing identified issues with the liability allocation process
 - b. to allow more people to realise the benefits of a fibre connection while also reducing the time taken to obtain the consent of all parties with an interest in the property a fibre connection needs to occupy, such as shared driveways or the common areas of multi-unit complexes, and
 - c. to extend the regulatory requirements relating to the Ultra-Fast Broadband programme to the extension of that programme.

Consistency of the Bill with the Bill of Rights Act

Section 14 – Freedom of expression

5. Section 14 of the Bill of Rights Act affirms the right to freedom of expression, which includes the freedom to seek, receive, and impart information and opinions of any kind

and in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.¹

6. Clauses 7 and 8 of the Bill insert new ss 81(2)(a) and 83(1)(b). These are minor technical changes which will reduce compliance costs for the telecommunications industry. Sections 81(2)(a) and 83(1)(b) enable the Commerce Commission to require liable persons² to provide certain information. Under Part 4A of the Act, a person who fails, without reasonable excuse, to provide information in accordance with ss 81 and 83 is liable to a pecuniary penalty of up to \$300,000.
7. It is arguable whether these disclosure requirements amount to compelled expression for the purposes of s 14 of the Bill of Rights Act as liable persons are simply required to provide factual information. Nevertheless, we have considered whether the relevant provisions are justifiable under s 5 of the Bill of Rights Act.
8. The disclosure of relevant information by liable persons is designed to enable the effective operation of the TDL. The purpose of these provisions is to determine who, and to what extent a person, may be liable to pay a share of the TDL. Accordingly, we consider that any provisions in the Bill that limit the freedom of expression are rationally linked to the objective.
9. The information is of a type that market participants can reasonably be expected to provide in the highly regulated telecommunications sector. We therefore consider that any limits placed on the right to freedom of expression appear to be in due proportion to the importance of those objectives and are justified under s 5 of the Bill of Rights Act.

Conclusion

10. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.



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¹ *RJR MacDonald v Attorney-General of Canada* (1995) 127 DLR (4th) 1.

² This also includes prospective liable persons.